

1 **FEDERAL ELECTION COMMISSION**

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3 **FIRST GENERAL COUNSEL'S REPORT**

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5 MUR: 7263  
6 DATE COMPLAINT FILED: July 11, 2017  
7 DATE OF NOTIFICATION: July 13, 2017  
8 LAST RESPONSE RECEIVED: August 4, 2017  
9 DATE ACTIVATED: December 22, 2017

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11 EXPIRATION OF SOL: April 9, 2022  
12 ELECTION CYCLE: 2018

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14 **COMPLAINANT:**

14 Brad Woodhouse  
15 American Democracy Legal Fund

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17 **RESPONDENTS:**

17 Allen Lucas Messer  
18 I Like Luke (f/k/a Luke Messer for Congress) and  
19 Craig Kunkle in his official capacity as treasurer

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21 **RELEVANT STATUTES AND**  
22 **REGULATIONS:**

21 52 U.S.C. § 30101(2)  
22 52 U.S.C. § 30102(e)  
23 52 U.S.C. § 30103(a)  
24 52 U.S.C. § 30104(a), (b)  
25 11 C.F.R. § 100.3(b)  
26 11 C.F.R. § 100.72  
27 11 C.F.R. § 100.131  
28 11 C.F.R. § 101.1(a)  
29 11 C.F.R. § 102.1(a)  
30 11 C.F.R. § 110.1  
31 11 C.F.R. § 110.8(d)(1)

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33 **INTERNAL REPORTS CHECKED:**

33 Disclosure Reports

34  
35 **FEDERAL AGENCIES CHECKED:**

35 None

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37 **I. INTRODUCTION**

38 This matter involves allegations that I Like Luke (f/k/a Luke Messer for Congress) and  
39 Craig Kunkle in his official capacity as treasurer ("the Committee"), and Allen Lucas "Luke"  
40 Messer (collectively "Respondents") violated the registration and reporting requirements of the  
41 Federal Election Campaign Act of 1971, as amended ("the Act") in connection with Messer's

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1 testing-the-waters activities for his 2018 Senate campaign. The Complaint alleges that Messer  
2 became a United States Senate candidate by April 2017, but failed to file a Statement of  
3 Candidacy and otherwise comply with the Act's registration and reporting requirements at that  
4 time.<sup>1</sup>

5 In a joint response, Messer, a sitting United States Representative, and the Committee  
6 assert that Messer was merely evaluating a possible Senate candidacy in April 2017, and that he  
7 did not become a Senate candidate until he announced his candidacy in July 2017.<sup>2</sup> Respondents  
8 also state that "Rep. Messer is and was *already* following all appropriate reporting of receipts  
9 and disbursements by way of his Congressional Committee."<sup>3</sup>

10 It appears that Messer's principal House re-election campaign committee, Luke Messer  
11 for Congress (n/k/a I Like Luke), reported receipts and disbursements relating to Senate testing-  
12 the-waters activity for the three-month period in question as being in connection with Messer's  
13 House re-election campaign, and not in connection with testing-the-waters for a 2018 Senate  
14 campaign. Further, after Messer declared his candidacy, the Committee was renamed "I Like  
15 Luke" but did not disclose any testing-the-waters activity, or amend prior disclosure reports to  
16 distinguish funds raised and spent for Senate testing-the-waters activities from funds raised and  
17 spent for the House re-election campaign. Accordingly, we recommend that the Commission  
18 find reason to believe that the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R.  
19 §§ 100.72(a) and 100.131(a). We also recommend the Commission find reason to believe that  
20 Messer violated 11 C.F.R. § 110.8(d) by failing to establish separate campaign organizations for

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<sup>1</sup> Compl. at 1 (July 11, 2017).

<sup>2</sup> Resp. at 1 (Aug. 4, 2017).

<sup>3</sup> *Id.* (emphasis as in original).

1 his House candidacy and potential Senate candidacy. There is, however, conflicting information  
2 as to the date Messer became a Senate candidate, and we recommend that the Commission  
3 exercise its prosecutorial discretion to dismiss the allegation that Messer failed to timely file a  
4 Statement of Candidacy, in violation of 52 U.S.C. § 30102(e).<sup>4</sup>

5 **II. FACTS**

6 Luke Messer is a U.S. Representative from Indiana's 6th Congressional District, and was  
7 a 2018 U.S. Senate candidate. Luke Messer for Congress was Messer's principal campaign  
8 committee for his House re-election campaign. After filing a Statement of Candidacy for the  
9 Senate in July 2017, the Committee's name was changed to "I Like Luke," and it served as  
10 Messer's principal campaign committee for his Senate campaign.<sup>5</sup>

11 The Complaint alleges that Messer should have registered with the Commission as a  
12 Senate candidate on or about April 9, 2017, when the Committee issued a press release naming a  
13 50-member State Campaign Finance Committee.<sup>6</sup> Emily Daniels, Messer's Deputy Campaign  
14 Manager for Finance, was quoted as describing the Finance Committee as people "who are  
15 committed to supporting Congressman Luke Messer for the United States Senate."<sup>7</sup> One article  
16 cited in the Complaint reports that Gregory Pence, who was chairing Messer's statewide Finance  
17 Committee, was considering a run for the House seat if Messer announced a run for the Senate.<sup>8</sup>

<sup>4</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>5</sup> See FEC Form 1, Statement of Organization, I Like Luke (Aug. 4, 2017). When Messer declared his candidacy, he changed the name of his House Committee to "I Like Luke" and declared it his authorized Committee.

<sup>6</sup> Compl. at 2.

<sup>7</sup> *Id.* See also *Congressman Messer Announces Statewide Campaign Finance Committee*, CITY-COUNTY OBSERVER (Apr. 9, 2017) at <http://city-countyobserver.com/congressman-messer-announces-statewide-campaign-finance-committee/>.

<sup>8</sup> *Id.* Tony Cook and Kaitlin Lange, Indianapolis Star, *Is the VP's Brother Looking to Throw His Hat into the Political Ring?*, USA TODAY (June 8, 2017) at

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1 In a May 30, 2017, Facebook post, Messer indicated that he had been “crisscrossing the State,”  
2 and it shared a fundraising email in which Messer declared that during these statewide trips, he  
3 heard a “chorus of supporters” encouraging a run to “challenge Senator Donnelly.”<sup>9</sup> The email  
4 further stated that Messer and his wife “continue to engage in daily conversations about the  
5 possibility of this journey” and asked “meanwhile, will you consider a contribution” and  
6 included a link to Messer’s House Committee contribution page.<sup>10</sup> Finally, the Complaint  
7 alleges that Messer’s House committee had collected more than \$700,000 in contributions during  
8 the first quarter of 2017, and had \$1.6 million total cash on hand, which the Complaint alleges  
9 was more than necessary to fund Messer’s re-election to the House.<sup>11</sup>

10 Messer contends that he did not become a Senate candidate until July 26, 2017, when his  
11 Committee issued a press release announcing his candidacy, and that prior to that announcement,  
12 he was only contemplating a run.<sup>12</sup> He asserts that information suggesting that others supported  
13 his potential run—including members of his House Committee’s newly formed statewide  
14 Finance Committee—and speculating that he would run for the Senate, did not mean that these

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<https://www.usatoday.com/story/news/politics/onpolitics/2017/06/08/pences-brother-looks-at-political-run/102624906/>. Pence has since declared himself a candidate for Messer’s House seat. See Gregory J. Pence, FEC Form 2, *Statement of Candidacy* (Oct. 18, 2017) at <http://docquery.fec.gov/pdf/361/201710189075796361/201710189075796361.pdf>. Pence won the primary election for that seat.

<sup>9</sup> Messer linked to the email sent to supporters in a May 30, 2017, Facebook post. See Messer email at <http://myemail.constantcontact.com/Crisscrossing-the-State.html?soid=1123214391458&aid=czA5F9JGCqo>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Brian Francisco, *Messer Campaign Touts Fundraising Total*, THE JOURNAL GAZETTE (Apr. 6, 2017) at <http://www.journalgazette.net/20170406/messer-campaign-touts-fundraising-total>.

<sup>12</sup> Resp. at 1; Resp. Attach. Committee Press Release from Greg Pence, *Messer to Kickoff [sic] Senate Campaign at Annual Family BBQ*, (July 26, 2017). See also Allen Lucas Messer, FEC Form 2, *Statement of Candidacy* (Aug. 4, 2017) at <http://docquery.fec.gov/pdf/526/201708040200245526/201708040200245526.pdf>.

1 individuals spoke on Messer's behalf or that he had decided to run for the Senate.<sup>13</sup> Messer's  
2 response points out that Pence was quoted as saying that "right now the only thing I am focusing  
3 on is helping Luke and Jennifer (Messer) make a big decision on whether or not they should run  
4 (for Senate)," which indicates that Pence knew that Messer had not yet decided to run for  
5 Senate.<sup>14</sup> Messer further denies that he had accumulated funds in excess of what would be  
6 required "in a year of political uncertainty" for a Congressional re-election campaign.<sup>15</sup> Finally,  
7 Messer purports that because the Committee was complying with the Act's reporting  
8 requirements related to his Congressional campaign, nothing would be gained by additional  
9 reporting.<sup>16</sup>

10 **III. LEGAL ANALYSIS**

11 According to the Act, an individual becomes a candidate if: (a) such individual receives  
12 contributions or makes expenditures in excess of \$5,000, or (b) such individual gives his or her  
13 consent to another person to receive contributions or make expenditures on behalf of such  
14 individual and if such person has received such contributions or has made such expenditures in  
15 excess of \$5,000.<sup>17</sup> Once the \$5,000 threshold has been met, the candidate has fifteen days to  
16 designate a principal campaign committee by filing a Statement of Candidacy with the  
17 Commission.<sup>18</sup> The principal campaign committee must file a Statement of Organization within

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<sup>13</sup> Resp. at 2.

<sup>14</sup> *Id.* See also *Is the VP's Brother Looking to Throw His Hat into the Political Ring?*, USA TODAY (June 8, 2017).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> 52 U.S.C. § 30101(2).

<sup>18</sup> *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

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1 ten days of its designation,<sup>19</sup> and must file disclosure reports with the Commission in accordance  
2 with 52 U.S.C. § 30104(a) and (b).<sup>20</sup>

3 Notwithstanding the reporting requirements triggered by an individual's candidacy, the  
4 Commission has established limited "testing the waters" exemptions that permit an individual to  
5 test the feasibility of a campaign for federal office without becoming a candidate under the Act.<sup>21</sup>  
6 These exemptions exclude from the definition of "contribution" and "expenditure" those funds  
7 received and payments made solely to determine whether an individual should become a  
8 candidate.<sup>22</sup> These regulations seek to draw a distinction between activities directed to an  
9 evaluation of the feasibility of one's candidacy and conduct signifying that a decision to become  
10 a candidate has been made.<sup>23</sup> Testing-the-waters activities include, but are not limited to,  
11 payments for polling, telephone calls, and travel, and only funds permissible under the Act may  
12 be used for such activities.<sup>24</sup> An individual who is testing the waters need not register or file  
13 disclosure reports with the Commission unless and until the individual subsequently decides to  
14 run for federal office.<sup>25</sup>

15 The testing-the-waters exemption is not available to individuals who have made a  
16 decision to become a candidate or conduct activities that indicate he or she has decided to

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<sup>19</sup> See 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(a).

<sup>20</sup> See, e.g., Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak); Factual and Legal Analysis at 5, MUR 6449 (Jon Bruning); Factual and Legal Analysis at 2, MUR 5363 (Alfred C. Sharpton).

<sup>21</sup> See 11 C.F.R. §§ 100.72, 100.131; Factual and Legal Analysis at 7, MUR 6775 (Hillary Clinton); Factual and Legal Analysis at 8, MUR 6776 (Niger Innis); Factual and Legal Analysis at 6, MUR 6735 (Joseph A. Sestak).

<sup>22</sup> See 11 C.F.R. §§ 100.72(a), 100.131(a).

<sup>23</sup> See Advisory Op. 1981-32 (Askew) ("AO 1981-32").

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; see also Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) ("AO 2015-09").

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1 become a candidate.<sup>26</sup> Commission regulations set forth a non-exhaustive list of activities that  
2 indicate that an individual is no longer testing the waters and has decided to become a candidate.  
3 Such indicia include: (1) using general public political advertising to publicize his or her  
4 intention to campaign for federal office; (2) raising funds in excess of what could reasonably be  
5 expected to be used for exploratory activities or undertaking activity designed to amass  
6 campaign funds that would be spent after he or she becomes a candidate; (3) making or  
7 authorizing written or oral statements that refer to him or her as a candidate for a particular  
8 office; (4) conducting activities in close proximity to the election or over a protracted period of  
9 time;<sup>27</sup> and (5) taking action to qualify for the ballot under state law.<sup>28</sup> An individual who is  
10 testing the waters need not register or file disclosure reports with the Commission unless and  
11 until the individual subsequently decides to run for federal office or conducts activities that  
12 indicate he or she has decided to become a candidate.<sup>29</sup> All funds raised and spent for testing-  
13 the-waters activities are, however, subject to the Act's limitations and prohibitions.<sup>30</sup>  
14 Commission regulations require that once the individual begins to campaign or decides to  
15 become a candidate, funds received and disbursed for testing-the-waters activities are subject to

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<sup>26</sup> See AO 2015-09 at 5; *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to evaluate a potential candidacy").

<sup>27</sup> The Commission has advised that there is no specific time limit for such activities, and the length of time spent testing the waters is but one factor in determining whether an individual becomes a candidate. AO 2015-09 at 6.

<sup>28</sup> 11 C.F.R. §§ 100.72(b), 100.131(b).

<sup>29</sup> *Id.*; *see also* Adv. Op. 1979-26 (Grassley) (funds raised or spent solely for exploratory purposes are not immediately subject to the Act's reporting requirements).

<sup>30</sup> 11 C.F.R. §§ 100.72(a); 100.131(a).

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1 the reporting requirements of the Act, and must be reported with the first report filed by the  
2 candidate's principal campaign committee.<sup>31</sup>

3 Finally, Commission regulations provide that an individual seeking more than one federal  
4 office, or a federal office and a state office, must designate separate principal campaign  
5 committees and maintain completely separate campaign organizations.<sup>32</sup> No funds, goods, or  
6 services may be transferred between or used by the separate campaigns.<sup>33</sup> If an individual  
7 wishes to contribute to both campaigns, the contributions for each election for each office must  
8 be made to separate committees.<sup>34</sup>

9 Although these rules do not expressly reference funds received for the purposes of testing  
10 the waters, the Commission extended their application in two advisory opinions. In Advisory  
11 Opinion 1982-19 (Cranston Presidential Advisory Committee), the Commission recognized that  
12 an individual may test the waters for a potential candidacy for one federal office while also a  
13 candidate for another federal office.<sup>35</sup> But the Commission determined that if an individual  
14 sought to make contributions to both the candidate's authorized campaign committee and his

<sup>31</sup> *Id.* Commission regulations further require that an individual testing the waters keep records of the name of each contributor, the date of receipt and amount of all funds received, and all payments made in connection with activities conducted under 11 C.F.R. §§ 100.72 and 100.131. *Id.* § 101.3.

<sup>32</sup> 11 C.F.R. § 110.8(d); Advisory Op. 1995-3 (Gramm) ("Commission regulations provide that a candidate seeking more than one Federal office must designate separate principal campaign committees and establish completely separate campaign organizations.") (superseded in part on other grounds); *Campaign Guide for Congressional Candidates and Committees* at 59-60 (June 2014), (presenting example of "Candidate B," who "begins the 2014 election cycle as a House candidate, but later begins a campaign for a Senate seat in 2014"); *see also* 52 U.S.C. 30102(e)(3) (prohibiting an authorized committee from supporting more than one candidate); 11 C.F.R. § 101.1(a) (requiring a candidate to include, *inter alia*, his or her name and address, party affiliation, and office sought when designating a principal campaign committee).

<sup>33</sup> 11 C.F.R. § 110.8(d)(2); *see* 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R. § 110.3(c)(5), (7).

<sup>34</sup> 11 C.F.R. § 110.1(f). Each contribution must be designated in writing by the contributor for a particular office, and a committee generally may not transfer funds to, loan funds to, make contributions to, or make expenditures on behalf of the candidate's other committee.

<sup>35</sup> *Id.* at 1.

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1 exploratory committee, the following requirements at section 110.1(f) must be met: (1) "the  
2 contributor designates in writing for which office each contribution is intended"; (2) "the  
3 candidate maintains separate campaign organizations (including separate committees and  
4 separate accounts"); and (3) "no funds are transferred, loaned or otherwise contributed between  
5 or among the separate campaigns and no expenditures are made by one campaign on behalf of  
6 the other."<sup>36</sup>

7 Likewise, in Advisory Opinion 1994-37 (Schumer), the Commission determined that the  
8 section 110.8(d) requirement that federal candidates maintain separate campaign organizations  
9 when running for more than one office applies to a candidate's testing the waters for another  
10 candidacy.<sup>37</sup> The Commission noted:

11 Although a testing the waters effort is not technically a candidacy as defined for  
12 Federal purposes . . . , the exploratory efforts by Mr. Schumer for a gubernatorial  
13 candidacy would constitute a campaign necessitating a separate organization  
14 from that of his House candidacy. In addition, the exploratory effort may very  
15 well develop into a candidacy.<sup>38</sup>  
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17 Thus, although the Commission has not squarely addressed this issue in an enforcement matter  
18 where a candidate actually used a single committee to raise and spend funds in connection with  
19 both a declared candidacy for one federal office and a testing the-waters effort for another office,  
20 the Commission has advised that federal candidates who have already designated an authorized  
21 committee for one candidacy should establish a separate account if they are testing the waters for  
22 another potential candidacy.

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<sup>36</sup> *Id.* at 4-5 (citing 11 C.F.R. § 110.1(f)).

<sup>37</sup> See also AO 1982-19.

<sup>38</sup> Advisory-Opinion 1994-37 at n.3 (Schumer) (advising on the required separation and allocation of costs between a principal campaign committee for the candidate's Congressional reelection campaign and an exploratory committee for a potential gubernatorial campaign).

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1       **A. There is Reason to Believe that the Committee Did Not Properly Report Receipts**  
2       **and Disbursements for Messer's Senate and House Campaign**

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4       Based on the guidance provided in AO 1982-19 and AO 1994-37, Messer should have  
5 established a separate organization for the purposes of receiving, spending, and reporting funds  
6 in connection with his testing-the-waters activities for his Senate campaign to comply with  
7 sections 110.1(f) and 110.8(d) of Commission regulations. Because Messer failed to do so, the  
8 Committee's reports inaccurately reflect that all of the activity from at least April 2017 through  
9 July 2017 was in connection with the House campaign, when available information indicates that  
10 Messer was raising and spending funds to test the waters for his Senate campaign. Further, once  
11 Messer became a registered Senate candidate, all of the funds raised and spent for testing the  
12 waters became contributions and expenditures governed by the Act's reporting provisions.

13       Under the Act, reports filed with the Commission must accurately disclose, *inter alia*, the  
14 total amount of all receipts and disbursements as well as total amounts in contributions and  
15 expenditures made to meet the candidate's or committee's operating expenses.<sup>39</sup> Commission  
16 regulations provide that treasurers are personally responsible for ensuring the timely and  
17 complete filing of committee reports and the accuracy of the information contained therein.<sup>40</sup>

18       In this case, the record indicates that Messer was testing the waters for his Senate  
19 campaign between April 2017 and July 2017, while he was also a House candidate. In addition,  
20 although Respondents contend that the Committee was reporting financial activity from this  
21 period, and that further reporting would not have added to the committee's disclosure reports, the  
22 activity was not *accurately* reported because it was not disclosed in connection with Messer's

<sup>39</sup> See 52 U.S.C. § 30104(b)(2), (4).

<sup>40</sup> 11 C.F.R. § 104.14(d).

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1 Senate race. Those reports do not indicate which funds were raised and spent for testing the  
2 waters, and the Committee did not disclose those funds as “contributions” and “expenditures”  
3 after Messer declared his Senate candidacy. Instead, the Committee’s reports seem to disclose a  
4 large amount of fundraising and spending entirely on behalf of Messer’s House re-election  
5 campaign.

6 Accordingly, we recommend that the Commission find reason to believe that Messer  
7 violated 11 C.F.R. § 110.8(d) by failing to establish and maintain separate campaign committees  
8 for each of his candidacies during the period in which Messer was testing the waters for his  
9 Senate candidacy,<sup>41</sup> and that the Committee violated 52 U.S.C. § 30104(b) and  
10 11 C.F.R. §§ 100.72(a) and 100.131(a) by failing to accurately report Messer’s receipts and  
11 disbursements for his House and Senate campaigns.

12 **B. The Commission Should Dismiss the Allegation that Messer Failed to Timely File**  
13 **his Statement of Candidacy for his Senate Run**

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15 Although Messer states that he was merely considering a run for the Senate, the April 9,  
16 2017, statement by Messer’s Deputy Campaign Manager for Finance that “we look forward to  
17 welcoming additional members to the team who are committed to supporting Congressman Luke  
18 Messer for the United States Senate” could be interpreted as indicating that Messer had already  
19 decided to become a Senate candidate. Even so, the time period between the Deputy Campaign  
20 Manager’s statement and Messer’s Senate candidacy announcement was relatively short and  
21 occurred long before the primary election. Given these circumstances, we recommend that the

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<sup>41</sup> We do not make a recommendation as to 11 C.F.R. § 110.1(f) given that this regulation sets forth requirements directed at the donor when making contributions, not to the committee receiving the contributions.

1 Commission exercise its prosecutorial discretion and dismiss the allegations that Messer  
2 untimely filed his statement of candidacy, in violation of 52 U.S.C. § 30102(e).<sup>42</sup>

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<sup>42</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).

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**V. RECOMMENDATIONS**

1. Find reason to believe that I Like Luke and Craig Kunkle in his official capacity as treasurer (f/k/a Luke Messer for Congress) violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 100.72(a), 100.131(a);
2. Find reason to believe that Allen Lucas "Luke" Messer violated 11 C.F.R. § 110.8(d);
3. Dismiss the allegation that Allen Lucas "Luke" Messer violated 52 U.S.C. § 30102(e) pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985);
4. Approve the attached Factual and Legal Analysis;
5. Enter into pre-probable cause conciliation with Allen Lucas "Luke" Messer and I Like Luke and Craig Kunkle in his official capacity as treasurer;
6. Approve the attached conciliation agreement; and

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7. Approve the appropriate letters.

Lisa J. Stevenson  
Acting General Counsel

Kathleen M. Guith  
Associate General Counsel

6.22.18

Date



Stephen A. Gura  
Deputy Associate General Counsel



Mark Shonkwiler  
Assistant General Counsel



Wanda D. Brown  
Attorney

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